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NO. 221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

MARY ZACHARIE BROCK, ET AL.,
Petitioners,

VS.

BARNSDALL OIL COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Mary Zacharie Brock and her husband, William Elton Brock, Allison Owen, E. Pendleton Owen, Bessie Howard Pickering and her husband, James E. Pickering, Theodore Zacharie Hardee, George W. Hardee, Sydenham Hardee, a person non compos mentis represented herein by said George W. Hardee as his legal guardian and next friend, Anice Wishart Warden and her husband, Charles Warden, Maurice Fleury Generelly, Jeanette Craighead Watson, a feme sole, Rita Howard Bobb, a feme sole, Elizabeth Howard Fitch, a feme sole, Florence Ellis Nicholls and her husband, Jesse

Crook Nicholls, James Zacharie Nicholls, Florence Nicholls Weitzmann and her husband, Francis White Weitzmann, Jesse Crooks Nicholls, Jr., Andrew Barry C. Nicholls, George Nicholls and Augustus H. Nicholls, a minor, represented herein by his next friend, said Jesse Crooks Nicholls, respectfully state as follows:

This is a petition for a writ of certiorari to review a judgment of United States Circuit Court of Appeals for the Fifth Circuit, which in all things affirmed a judgment of the District Court of United States for the Southern District of Texas, Corpus Christi Division, which denied your petitioners any relief, and which judgment of said appellate court was rendered in cause No. 9662 in said court, entitled Frank A. Ash and Mary Zacharie Brock, et al., appellants, vs. Barnsdall Oil Company, et al., appellees. The opinion herein of said appellate court is reported in 118 Fed., (2d), 699, the concurring opinion of Circuit Judge Sibley appearing on page 702, on motions for rehearing.

STATEMENT OF THE MATTER INVOLVED

This action was brought by your petitioners in said District Court against one Delaware corporation, namely: Barnsdall Oil Company, and three Texas corporations, namely: Four Bluff Oil Corporation, Humble Oil & Refining Company and Humble Pipe Line Company, for recovery of and title to an undivided two-thirds interest in certain oil bearing land situated near Corpus Christi, in Nueces County, Texas, and for an accounting by said four defendants below as to several million barrels of oil alleged to have been produced and removed by said four defendants from said land. (R. 34 to 36)

Your petitioners brought said action as heirs at law of James W. Zacharie, deceased, alleging that said decedent was a devisee of said undivided interest in said

land in and under the last will and testament of one John Peter Schatzell, deceased, which was duly probated in Nueces County, Texas.

An intervention was filed in said cause, in trial court, by Frank A. Ash and seventy-nine (79) others, as alleged heirs at law of said John Peter Schatzell, deceased, and one G. H. Nagel joined therein as alleged assignee of some or all of said alleged heirs of said Schatzell. It seems unnecessary here to set out said names; they appear on pages 97 to 104, both inclusive, of record in Circuit Court of Appeals.

Said alleged heirs of Schatzell, deceased, were also denied any relief and they prosecuted a separate appeal to said Circuit Court of Appeals. Said appeal and that of your petitioners were covered by one printed transcript of the record.

In the trial court various persons and corporations, other than said alleged heirs at law of said Schatzell, deceased, intervened as defendants in the cause, claiming as owners of divisible parts of the land involved or as owners of oil and gas royalty interests therein. (R. 220, 275, 281 and 284)

While the case was in the District Court your petitioners, plaintiffs below, compromised with all four of the original defendants as hereinabove named and also with all intervening defendants other than these, namely: J. O. Phillips; Haynie E. Edwards; J. P. Webster & Sons, a co-partnership composed of A. A. Webster, Mrs. Ruby Webster March (joined by her husband, John Abe March) and Mrs. Corabel Webster DeWees, a feme sole; A. A. Webster, individually; Don P. Webster; D. R. Snow; Mrs. Mary C. Collier, a widow; Mrs. Mabel Eppright, a widow; Mrs. Gladys Hooper and husband, Sidney L. Hooper; Alwyn S. Collier; Dr. G. R. Collier; E. F. Gracey; R. J. St. Germain; George R. Brown; J. C. Poole;

George Harrington; D. A. Ross; J. L. Camp; C. C. Wurzbach; W. W. Kelley; J. T. Smith; James C. Nelson; Stoddart J. Smith; Royalties Management Corporation; R. L. Howard; Sandrock Royalty Company; Redrock Royalty Company; Houston Royalty Company; Sabine Production Company; and Robertson Securities and Investment Company; Alexander Deussen; W. B. Collier; Mrs. Lillian Ware, and husband, S. L. Ware; W. N. Hooper; Betty Rutherford, and husband, P. R. Rutherford; Helen McCoy Hedley, and husband, J. D. Hedley; Lon H. Cron; Mrs. Marian D. Mason; M. Preston Goodfellow; Robert M. Winslow; D. C. Everest; Alice A. Phelan; Alder Realty Company; Mrs. Marjorie M. McKinley, and husband, L. Parker McKinley; Mark C. Meltzer, Jr.; Raymond M. Gunnison; Robert S. Blair; Austin K. Neftel; Dorothy T. Fales; Thomas G. Blakeman; Mrs. Rose Haworth Tenney, and husband, ...Tenney.

In the final judgment of the trial court (R. 355 et seq.) it was among other things adjudged as follows: that the title to the land involved herein passed to and vested in one Robert Mott by virtue of a deed executed and delivered to him by one Samuel W. Fullerton acting as administrator pro tempore of the estate of said John Peter Schatzell, deceased, and therefore, that none of your petitioners as plaintiffs and none of said alleged heirs of John Peter Schatzell, deceased, as intervening plaintiffs should recover anything against any of said four original defendants or as against these intervening defendants, to-wit: said J. O. Phillips and others last above named.

Said judgment was based upon a pre-trial stipulation and order and findings of fact and conclusions of law made by the district judge pursuant to Rule 52 of Federal Rules of Civil Procedure. (R. 25 to 30 and 369 to 386)

GROUNDS OF JURISDICTION

Your petitioners believe that the Supreme Court of the United States has jurisdiction to grant them the writ of certiorari herein since this is a civil case in a Circuit Court of Appeals, under and pursuant to Section 240 of the Judicial Code of the United States as amended and re-enacted in and by the Act of February 13, 1925, chapter 229, 43rd Statutes, 936.

The sole ground of jurisdiction of said District Court of the United States for the Southern District of Texas was diversity of citizenship between your petitioners, as plaintiffs below, and all and singular the other parties to this cause in the trial court, original defendants, intervening plaintiffs and intervening defendants, respectively.

In the trial court it was stipulated, and said court found, that when this suit was instituted below every one of your petitioners was a non-resident of the State of Texas and a citizen of some state other than Texas, or a citizen of some foreign state or country; also, that on date of institution of suit every defendant herein was either a citizen of the State of Texas or a citizen of some state of the United States of which none of the plaintiffs, petitioners herein, was a citizen: also, that the amount in controversy herein is in excess of Three Thousand Dollars ($3,000.00) exclusive of interest and costs. (R., 25 and 26)

Final judgment was rendered in the District Court on March 20, 1940. (R., 355, 364)

On June 12, 1940, your petitioners, plaintiffs below, filed their notice of appeal and their appeal bond, duly approved. (R., 668 and 686.) And on the same date they filed their statement of points on which they intended to rely on their said appeal. (R., 698)

On July 8, 1940, the United States district judge by order extended the time for the filing and docketing of the cause in said United States Circuit Court of Appeals for the Fifth Circuit from forty (40) days to ninety (90) days from and after June 4, 1939. (R., 751)

The original record on appeal was received by the clerk of said United States Circuit Court of Appeals on August 29, 1940: printed copies thereof were filed with said clerk on November 30, 1940.

On March 3, 1941, said U. S. Circuit Court of Appeals entered judgment in all things affirming judgment of the trial court. (R., 770) On the same date the opinion of that court was filed. (R., 764)

On March 24, 1941, your petitioners filed with the clerk of said appellate court their petition for a rehearing in this cause. (R., 784)

Your petitioners' said motion for a rehearing was denied on March 29, 1941. (R., 796 and 799)

On rehearing Circuit Judge Sibley filed a concurring opinion. (R., 797)

From the foregoing it is apparent, (a) that said United States District Court had jurisdiction herein, based solely upon diversity of citizenship and amount involved, and (b) that said United States Circuit Court of Appeals had appellate jurisdiction herein and (c) that this petition for writ of certiorari has been seasonably filed with the clerk of United States Supreme Court, and that said court has power to grant this petition.

THE QUESTIONS PRESENTED

John Peter Schatzell died October 23, 1854, at his home in Corpus Christi, Texas, leaving an estate inventoried at $145,300.00, including the land involved herein

valued at $10,000.00. (R., 443, 448) In July, 1855, James W. Zacharie, the ancestor of your petitioners, filed in County Court of Nueces County, his application to probate the holographic will of said Schatzell; said application was contested by alleged heirs of said testator but their contest was overruled and the will was probated on January 5, 1856. (R., 487) Soon thereafter one Samuel W. Fullerton was appointed and qualified as administrator of estate with will annexed. On March 26, 1856, said alleged heirs of Schatzell instituted certiorari proceedings in District Court of Nueces County seeking to vacate said order of probate of will. (R., 416) Some ten years or more thereafter said certiorari cause was dismissed. (R., 507)

Because of said certiorari proceedings and pursuant to applicable Texas laws, on April 28, 1856, said Fullerton was appointed and qualified as administrator pro tempore of estate during the pendency of the contest evidenced by said certiorari proceedings. (R., 502)

While said certiorari cause was still pending in the District Court and while said Fullerton was still acting merely as administrator pro tempore of the Schatzell estate, said administrator pro tempore applied to said County Court, sitting in probate, for an order to sell the land involved herein and said court attempted to grant said application and to authorize said sale of land by said administrator pro tempore: and thereafter on March 1, 1860, acting pursuant to an order of said County Court, sitting in probate, which attempted to confirm a report of sale made to it by said administrator pro tempore, (which sale was made for a $3,100.00 note secured by mortgage on the land), said Fullerton as such administrator pro tempore of estate executed and delivered to one Robert Mott an attempted conveyance of said land involved herein. (R., 524)

The basic questions presented herein are these:

(a) That said County Court of Nueces County, sitting in probate, had no power or authority under applicable Texas laws and decisions to authorize said Fullerton as a mere administrator pro tempore of the Schatzell estate thus to sell and convey said land to said Mott; and

(b) That, in any event, said attempted sale of land to Mott was void because no provision therefor was made or contained in the original order of April 28, 1856, appointing said Fullerton as such administrator pro tempore of estate, and that said County Court, sitting in probate, had no right or power thereafter to enlarge or increase the powers of such administrator pro tempore so as to authorize such attempted sale and conveyance of land to Mott.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Said Circuit Court of Appeals for the Fifth Circuit has in this case decided an important question of local law in a way which conflicts with applicable statutes of the State of Texas and applicable Texas decisions, and has herein so far departed from the accepted and usual course of judicial proceedings in Texas as to call for an exercise of the Supreme Court's power of supervision.

On March 20, 1848, Texas Legislature enacted Chapter 157, General Laws of Second Legislature, entitled: "An Act to regulate proceedings in the County Court pertaining to the estates of deceased persons": that law was in force, with unimportant exceptions, until 1876. Under that law and the then Constitution of the State of Texas, the County Court of Nueces County, Texas, had general probate jurisdiction.

The immediately applicable parts of that law were as follows:

"Section 27. That wills shall be probated, and letters testamentary or of administration, **with full powers,** shall be granted only in open court at a regular term thereof, after application in writing, and notice, as hereinabove required; but whenever it may appear to the chief justice that the interest of an estate requires the immediate appointment of an administrator, he shall, either in open court or in vacation, by writing under his hand and the seal of the court, attested by the clerk, appoint some proper person administrator pro tem., **with such limited powers** as the circumstances of the case may require. Such appointment may be made without notice—shall **define the powers conferred,** and before being delivered to the person appointed, shall be recorded in the minutes of the court, and the clerk shall endorse thereon a certificate that it has been so recorded, and until such record and certificate are made, the appointment shall not take effect. Such appointment shall cease to be of force on the first day of the term of the court next after the date thereof; unless continued in force by an order entered on the minutes in open court; and in no case shall such appointment continue in force beyond the first day of the second term of the court next after the date thereof."

"Section 28. That pending any contest relative to the probate of a will, or the granting of letters of administration, whether such contest be in the County Court, or in any other court on appeal, it shall be the duty of the chief justice to appoint an administrator pro tem., in the manner prescribed in the preceding section, and **with such limited powers** as the circumstances of the case may require. Such appointment may continue in force until the termination of the contest, and the ap-

pointment of an executor or administrator **with full powers."** (All Bold Face ours)

"Section 29. That before the issuance of letters of administration pro tem., under the provisions of the two preceding sections, the person appointed shall take and subscribe an oath and enter into bond; which bond and oath shall be, in substance, the same as the bond and oath required of other administrators, varying the form to suit the circumstances of the particular case—and such bond and oath shall be filed and recorded in like manner as other bonds of administrators."

Section 38 provided that whenever letters testamentary or of administration should be granted, the chief justice should appoint three disinterested appraisers, while Section 39 provided that every executor or administrator should, immediately after appointment, with assistance of appraisers, make a full inventory and appraisement of the estate. Section 40 provided that said inventory and list should be returned to the court by the executor or administrator within sixty days after his appointment. Section 46 provided that every executor or administrator should, within one month after appointment, publish in some newspaper a notice to all creditors of the estate. Section 47 provided that every money claim against the estate should be presented to the executor or administrator within one year after original grant of letters testamentary or of administration, otherwise payment thereof should be postponed in favor of claims presented within said time.

Section 54 provided thus: "That it shall be the duty of every executor, or administrator, so soon as he shall ascertain that it is necessary, to apply to the chief justice at some regular term of the court, for an order to sell so much of the property of the estate he represents, as he shall think sufficient to pay the expenses of adminis-

tration and the debts of the estate; such application shall be in writing, and shall be accompanied by a statement in writing, of the estimated expenses of administration; and of all the claims against the estate that have been presented to him, specifying what claims have been allowed by him, what rejected, and those upon which suit has been instituted against him; with the condition of such suit or suits, which statement shall be verified by affidavit; upon the presentation of such application and statement, it shall be the duty of the chief justice, if satisfied that there is a necessity for such sale, to order the same to be made."

Section 55 provided that whenever an executor or administrator should neglect to comply with the provisions of said Section 54, any creditor of the estate might, upon notice to the executor or administrator, obtain an order of the court requiring the executor or administrator to proceed as provided for in Section 54.

Section 56 provided for a sale, upon application by executor or administrator or heir or devisee or legatee or "any creditor of the estate", of estate property "that is perishable or liable to waste."

Section 57 made special provision for a sale, under proper order of court, of crops belonging to the estate of a decedent, order of sale to be made upon application of executor, administrator, heir, devisee, legatee or any creditor of estate.

Section 82 provided: "That at the first term of the court after the expiration of twelve months from the time of the original grant of letters testamentary or of administration, it shall be the duty of the executor or administrator to return to the court an exhibit, in writing, sworn to and subscribed by him, setting forth a list of all claims against the estate that were presented to him

within twelve months after the said grant of letters testamentary or of administration, specifying which have been allowed by him; which have been rejected, and the date when rejected; which have been sued upon, and the condition of suit; also, setting forth fully the condition of the estate; and if any executor or administrator shall neglect to return such exhibit at the term of the court named above, it shall be the duty of the chief justice to revoke his letters," without notice to the executor or administrator.

Section 84 provided that at the third regular term of the court after the expiration of twelve months from the original grant of letters testamentary or of administration, the executor or administrator should return to the court "a further exhibit in writing, sworn to and subscribed by him."

Section 86 provided that "at the third regular term of the court after the expiration of twelve months from the original grant of letters testamentary or of administration, or at any term of the court after that, any person interested in the estate may, by complaint in writing, filed in the County Court, cause the executor or administrator to be cited to appear at a regular term of the court, and make an exhibit in writing, under oath to the court," etc.

Section 116 provided that whenever an administrator pro tem., "'shall have been appointed and an executor shall afterwards be qualified, or an administrator appointed, such executor or administrator shall succeed and be made a party to all suits and actions prosecuted by or against such administrator pro tem; and such executor or administrator shall have the right to settle with such administrator pro tem. and receive and receipt for all the estate remaining in his hands; and shall have the right to use, in like manner as is provided for in the

previous section, on the bond of such administrator pro tem., for all the estate not accounted for by him."

Section 135 provided: "That the rights, powers and duties of executors and administrators shall be governed by the principles of the common law, where the same does not conflict with the provisions of this Act."

Of the 137 sections of that very comprehensive probate law only Sections 27, 28, 29 and 116 mentioned, directly or indirectly, an "administrator pro tem" of an estate. On the other hand, the words "executor or administrator" were used in more than thirty of those sections, including these: Section 18, 22, 26, 33, 39, 40, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 59, 67, 70, 72, 79, 82, 84, 85, 86, 87, 88, 89, 90, 111 and 135, respectively.

In both Sections 27 and Section 28, supra, the highly significant words "with such limited powers as the circumstances of the case may require" were used as to administrators pro tem.: and in Section 28 those words were used in sharp contrast with the words "full powers" as therein applied to the "executor or administrator" who was to be appointed at termination of the contest mentioned in said Section 28.

That Act is silent as to any power of the probate court to authorize a mere administrator pro tem. to sell and convey property of any kind, more especially land.

That Act is also silent as to any power of the probate court to authorize a mere administrator pro tem. to consider and either allow or reject claims against the estate of the decedent.

On the other hand, that Act is replete with very clear and numerous provisions with respect to the presentation of claims to the executor or administrator, the allowance or rejection thereof by such executor

or administrator, the mode of payment of allowed claims and expenses of administration, etc., etc.

The decision of said Circuit Court of Appeals herein is in conflict with these decisions by appellate courts of Texas, towit:

Alexander vs. Barfield, 6 Tex., 400;
Dull vs. Drake, 68 Tex., 205, and 4 S. W., 364;
Cruse vs. O'Gwin, 106 S. W., 757, writ of error refused by Texas Supreme Court.

The above cited Texas statutes and Texas decisions are discussed in brief for your petitioners, annexed hereto.

It is believed by counsel for your petitioners that in its decision of this cause said Circuit Court of Appeals failed to consider, apply and follow the principles of law announced by this court in many late cases including these decided at the last term, to-wit:

Stoner vs. New York Life Insurance Co.;
Breisch vs. Central Railroad Co. of New Jersey;
Moore vs. Illinois Central Railroad Co.;
Klaxon Co. vs. Stentor, etc., Co.; and
Griffin vs. McCoach.

Wherefore, your petitioners, referring to the attached brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court will issue a writ of certiorari addressed to said United States Circuit of Appeals for the Fifth Circuit, directing said court to send to this court a full and complete transcript of the record in this cause, to the end that this case may be reviewed by the Supreme Court and determined by this court, as provided by law, and that the judgment of said United States Circuit Court of Appeals for the Fifth Circuit may and shall be reversed by the Supreme Court, and that your petitioners may and shall have such other

and further relief in the premises as to this Honorable Court may seem right and just.

AND YOUR PETITIONERS WILL EVER PRAY.

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